89- 1488

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOSHUA BASIN PARTNERSHIP, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON WRIT OF CERTORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE 10TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles E. Weller, Esq., on behalf of JOSHUA BASIN PARTNERSHIP, et al., petitions for a Writ of Certiorari to review the Judgment of the UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT in this case.

QUESTIONS PRESENTED FOR REVIEW

1. Since the United States Department of the Interior has declined to issue regulations related to the concept of "waiver" as it applies to Federal natural resources law, despite the urgings of two Courts of Appeals, will the Supreme Court give guidance?

2. Whether commonly understood legal expressions and terms of art common to a particular federal program, as used in a waiver relating to that program, render such waiver void for vagueness.

3. Does a Promissory Note which exempts 40% of the revenue of the maker

from attachment, create an interest in the payee in the remaining 60%?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Appellants below were: JOSHUA BASIN PARTNERSHIP, MESOZOIC-PALEOZOIC JOINT VENTURE, SHASTA BASIN PARTNERSHIP, and TAYLOR BASIN PARTNERSHIP. Appellant, MESOZOIC-PALEOZOIC JOINT VENTURE, has chosen not to participate in this Petition.

Appellee below was THE UNITED STATES DEPARTMENT OF THE INTERIOR.

TABLE OF CONTENTS

	Page
Table of Authorities	3-4
Opinions Below	5-6
Jurisdiction	6-8
Statutory and Regulatory Provisions Involved	6-8
Statement of Case	8-12
Reasons for Granting the Writ	12-18
Conclusion	18

Page

Appendix A: a1-a9
Order and Judgment of United States District Court of Appeals for the Tenth Circuit, Case Nos. 86-2816 and 86-2817, filed December 20, 1989.

Appendix B: b1-b13
Order of the United States District Court for the District of Wyoming, Case No. C85-0538-B, filed October 10, 1986.

Appendix C: c1-c5
Order of the Interior Board of Land Appeals Denying Motion for Reconsideration, Case Nos. 84-100, 84-101, 84-196, 84-226, filed August 13, 1985.

Appendix D: d1-d34
Decision of Interior Board of Land Appeals, Case Nos. 84-100, 84-101, 84-196, 84-226, filed June 13, 1985.

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

City of Valdosta v. Harris, ... 17
119 S.E. 625, 156 GA. 490

Coyer v. Watt, ... 11, 13
720 F. 2d 626 (10th Cir. 1983)
cert. denied, 466 U.S. 972 (1984)

Gonzales v. Diaz, ... 17
398 N.Y.S. 2d 484, 91 Misc. 2d 629

Hairgrove v. City of Jacksonville,. 17
8 N.E. 2d 187, 366 Ill. 163

Page

In re Sutton's Will, ... 17
268 N.Y.S. 458, 150 Misc. 137

Lowey v. Watt, ... 11, 13
684 F.2d 957 (D.C. Cir. 1982)

New Mercur Mining Co. v.
South Mercur Mining Co., ... 15
102, Utah 131, 128 P.2d 269
(1942) cert denied, 319 U.S.
753 (1943)

State of Oregon Racing Commission
v. Multonomah Kennel Club, ... 17
411 P.2d 63, 242 Or. 572

STATUTES:

5 U.S.C. Section 701, et seq. ... 12
28 U.S.C. Section 1254(1) ... 6

REGULATIONS

43 C.F.R. Section 3100.0-5(b) 6-7,10
(1982) 16

43 C.F.R. Section 3102.2-7 ..... 7-8, 9
(1982)

43 C.F.R. Section 3112.2-1(b) 8-9
(1982)

MISCELLANEOUS

Black's Law Dictionary, ... 15
Fifth Edition (1979), page 254.

Corpus Juris Secundum, (1967) 15
Volume 15A, page 90.

Words and Phrases, (1951) 15
Volume 8, pages 214-215.

OPINIONS BELOW

The Order and Judgment of the Court of Appeals (App. A, infra, a1-a9) reversed the decision of the District Court below in relation to Petitioners Taylor Basin Partnership and Shasta Basin Partnership and affirmed in relation to Paleozoic-Mesozoic Joint Venture and Joshua Basin Partnership. The Order of the Court of Appeals is not reported.

The Interior Board of Land Appeals ruled against all petitioners (Appendix D, Infra d1-d34). This opinion is reported at 87 IBLA 179 (1985).

The Interior Board of Land Appeals on Reconsideration, upheld its prior decision (Appendix C, infra c1-c5). This Order is not reported.

The United States District Court for the District of Wyoming affirmed the Interior Board of Land Appeals decision in relation to Petitioners Paleozoic-Mesozoic Joint Venture and Joshua Basin

Partnership, and reversed in relation to Taylor Basin Partnership and Shasta Basin Partnership (Appendix B, infra b1-b13). The District Court's Order is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

43 C.F.R. Section 3100.0-5(b) (1982):

> 'Sole party in interest' means a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to an application, offer or lease in which any other party has any of the interests described in this section. The requirements of disclosure in any application or offer of an applicant's or other parties' interest in a lease, if issued, reflect the policy that all applicants and other parties having an interest in simultaneously filed lease applications or offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means of maintaining

adequate records of acreage holdings. An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests operating rights of options or any agreements covering such 'interest'. Any claim or any prospective or future claim to an advantage or benefit from a lease, or any participation or any defined or undefined share in any increments, issues or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the application or offer is filed, is deemed to constitute an 'interest' in such lease.

43 C.F.R. Section 3102.2-7 (1982):

(a) The applicant shall set forth on the lease offer, or lease application if leasing is in accordance with subpart 3112 of this title, or on a separate accompanying sheet, the names of all other parties who own or hold any interest in the application, offer or lease, if issued.

(b) A statement, signed by both the offeror or applicant and the other parties in interest, setting forth the nature of any oral understanding between them, and a copy of any written agreement shall be filed with the proper Bureau of Land Management office not later than 15 days after the filing of the offer, or application if leasing is in accordance with subpart 3112 of this title. Such

statement or agreement shall be accompanied by statements, signed by the other parties in interest, setting forth their citizenship and their compliance with the acreage limitations of Sections 3101.1-5 and 3101.2-4 of this title.

43 C.F.R. Section 3112.2-1(b) (1982):

No person or entity shall hold, own or control an interest in more than 1 application for a particular parcel.

STATEMENT OF CASE

Appellants are partnerships which participated in the Department of the Interior's oil and gas lease lottery. In order to so participate, Appellants employed the services of Federal Lease Filing Corporation (FLFC) and its wholly owned subsidiary Federal Lease Filing Services Corporation (FLFSC). FLFC and FLFSC directed Appellants in the selection of the most valuable oil and gas leases offered through the lottery and in compliance with lottery's application procedures.

Each appellant was selected at lottery as the "winner" of a particular

oil and gas lease. The Department of the Interior thereafter rejected appellants' applications, finding a violation of 43 C.F.R. Section 3112.2-1(b) (1982), which provided that no person shall own an interest in more than one application for a particular oil and gas lease, and 43 C.F.R. Section 3102.2-7 (1982), which required that the applicant disclose all persons and entities having an interest in the lease.

Appellants appealed to the Interior Board of Land Appeals (IBLA) which affirmed. On request for reconsideration appellants asked the IBLA to hold that no "interest", as defined in 43 C.F.R. Section 3100.0-5(b), was created by appellants agreements with FLFC and FLFSC, and to consider certain waivers which existed in these agreements.

Specifically, the language objected to by the Department of the

Interior in the contracts of Joshua Basin Partnership and Mesozoic-Paleozoic Joint Venture was "Principal on the note shall be payable from 60% of the revenues of the maker". The District Court found that this language created an "interest" within the meaning of 43 CFR Section 3100.0-5(b). The Court of Appeals affirmed the District Court and the Interior Board of Land Appeals on this issue.

Specifically, the waivers contained in the contracts of Taylor Basin Partnership provided "any provision of this contract which is found to violate any Federal Statute or regulation relating to oil and gas leasing is void ab initio". The District Court found this language to be irrelevant (Order dated October 10, 1986, at Appendix B, page b-9). The Court of Appeals did not discuss this issue.

Specifically the agreements of

Taylor Basin Partnership and Shasta Basin Partnership contain the waiver, "FLFSC, its affiliates and O & GLPC shall have no priority interest of any kind in any lease won by the Partnership or the profits arising therefrom; any community of interest is hereby disclaimed by the parties hereto".

The District Court reversed the Interior Board of Land Appeals and upheld this waiver citing Lowey v. Watt, 684 F.2d 957, 967 (D.C. Cir. 1982) and Coyer v. Watt, 720 F.2d 626, 629 (10th Cir. 1983), cert denied, 466 U.S. 972 (1984), as cases which had given effect to similar unilateral disclaimers by applicants in the Department of the Interior's oil and gas lease lottery. The District Court noted that the over-reaching policy of the leasing program is fairness and that upholding the IBLA despite an unequivocal waiver would penalize the innocent applicants and

adversely affect the program itself (District Court Opinion, Appendix B, infra b 10-11). The Court of Appeals reversed the District Court by finding that the terms "priority interest" and "any community of interest" were vague. The Court of Appeals' ruling was based on, "the absence of any evidence that FLFC waived its entire interest in lease proceeds".

Jurisdiction of the District Court, below, was founded on Title 5 of the United States Code, Sections 701, et seq.

REASONS FOR GRANTING THE WRIT

The Federal Onshore Oil and Gas Leasing Program is the government's third largest revenue producer after the Internal Revenue Service and the Offshore Leasing Program. This program, together with the mining, leasing and sale programs administered on the roughly 1/3 of the American land mass which constitutes federal lands, are critical

to the nation's energy, strategic mineral and industrial future. All of these programs have in common the fair allocation of scarce and valuable resources to abundant, interested individuals and entities. In order to ensure the fairness of allocation, each of these programs is involved with the concepts of "priority", "community of interest", and "waiver".

Two Courts of Appeals have decried the Department of the Interior's lack of regulations in the area of "waiver". Coyer v. Watt, supra; Lowey v. Watt, supra.

The Department has declined to adopt any regulations in response to these decisions, thereby calling upon the courts to fashion this area of the law.

The Court of Appeals' decision, below, instead of adding to this area of law, so far departed from the accepted course of judicial proceedings as to call for an

exercise of this Court's power of supervision in this important program. Moreover, the need for additional guidance in this area, as identified by two Circuit Courts of Appeals, is an important question of Federal law which has not been, but should be, settled by the Court.

In relation to Petitioners Taylor Basin Partnership and Shasta Basin Partnership, the Court of Appeals ignored the affect of a waiver, which states, "FLFSC, its affiliates and O & GLPC shall have no priority interest of any kind in any lease won by the Partnership or the profits arising therefrom; any community of interest is hereby disclaimed by the parties hereto". The Court reasoned that the terms "community of interest" and "priority interest" were too vague to give the purported waiver any effect.

The term, "community of interest" is anything but vague. The term is defined

by Blacks Law Dictionary, Fifth Edition (1979), as follows:

> Term as applied to relation of joint adventure means interest common to both or all parties, that is, mixture or identity of interest in venture wherein each and all are reciprocally concerned and from which each and all derive material benefit and sustain a mutual responsibility.

The term is found in West Publishing Company's Words and Phrases (1951), Volume 8, pages 214-215 with 24 attendant citations, all of which support the definition supplied by Black's Law Dictionary. The term is also found in Corpus Juris Secundum (1967), Volume 15A, page 90. All of these sources supply similar definitions for the term and none suggest that the term is vague.

Aside from having currency in the law in general, the term "community of interest" is a commonly and specifically used in the area of natural resources law. New Mercur Mining Co. v. South Mercur Mining Co., 102 Utah 131, 128 P.2d

269, 274-75 (1942), cert. denied, 319 U.S. 753 (1943).

Similarly, the words "priority" and "interest", as used in the waiver phrase "priority interest", have commonly understood definitions, as well as specific uses in the area of natural resources law. Indeed both words appear in 43 CFR 3100.0-5(b) (1982) which was the Federal regulation which the Court of Appeals was called on to interpret.

Petitioners' waiver clearly and unambiguously waived any potential interest that FLFSC might have had in lease proceeds.

Joshua Basin Partnership's contracts contain the language, "Principal on the Note shall be payable [to FLFSC] from 60% of the revenues of the maker". The IBLA, the District Court and the Court of Appeals, below, all found that this language created an enforceable interest in FLFSC within the meaning of 43 C.F.R.

Section 3100.0-5(b) (1982). This is simply not the case.

The world "payable" when used to designate a source of revenue, limits the assets available to the person to be paid. The term does not require payment from the designated assets, it requires that other assets shall not be used for payment. Hargrove v. City of Jacksonville, 8 N.E. 2d 187, 194, 366 Ill. 163; City of Valdosta v. Harris, 119 S.E. 625, 156 Ga.490.

The word "payable" is of ambiguous import. In re Sutton's Will, 268 N.Y.S. 458, 150 Misc. 137; Gonzales v. Diaz, 398 N.Y.S. 2d 484, 487, 91 Misc. 2d 629; State of Oregon Racing Commission v. Multnomah Kennel Club, 411 P.2d 63, 67, 242 Or. 572.

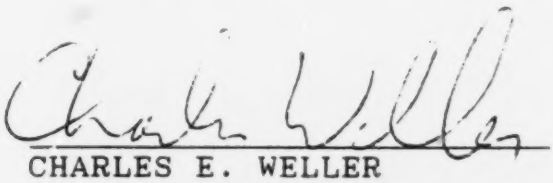
Petitioners' cases are representative of approximately 30 other cases which are stayed before the United States Department of the Interior pending the

outcome of this matter.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 20th day of March, 1990.



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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Entered
December 20, 1989

JOSHUA BASIN PARTNERSHIP; MESOZOIC-PALEOZOIC JOINT VENTURE, Plaintiffs, TAYLOR BASIN PARTNERSHIP; SHASTA BASIN PARTNERSHIP, Plaintiffs-Appellees, v. DEPARTMENT OF INTERIOR; DONALD P. HODEL, Defendants-Appellants.	No. 86-2816 (D.C. No. C85-0538-B) (D. Wyo.)
JOSHUA BASIN PARTNERSHIP; MESOZOIC-PALEOZOIC JOINT VENTURE, Plaintiffs-Appellants, TAYLOR BASIN PARTNERSHIP; SHASTA BASIN PARTNERSHIP, Plaintiffs, v. DEPARTMENT OF INTERIOR; DONALD P. HODEL, Defendants-Appellees.	No. 86-2817 (D.C. No. C85-0538-B) (D. Wyo.)

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK, Circuit Judges, and GREENE,** District Judge.

**Honorable J. Thomas Greene, District Judge, United States District Court for the District of Utah, sitting by designation. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. These cases are therefore ordered submitted without oral argument.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

These appeals arise from an order of the district court affirming the Interior Board of Land Appeals (IBLA) decision to reject the lease applications of plaintiffs Mesozoic-Paleozoic Joint Venture and Joshua Basin Partnership and reversing the IBLA's decision to reject the lease applications of the Taylor Basin and Shasta Basin Partnerships.

Plaintiff partnerships were originally formed for the purpose of filing applications in the noncompetitive simultaneous oil and gas leasing program run by the Department of Interior. See 30 U.S.C. 226(c) (1986).1 The partnerships then entered into service agreements with the Federal Lease Filing Service Corporation (FLFSC), a wholly owned subsidiary and collection service for the

1/ This program was terminated by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 as a part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. The regulations involved have also been repealed. See 53 Fed. Reg. 22,843 (1988).

Federal Lease Filing Corporation (FLFC)/2 a private corporation, which provided that FLFSC would select land parcels and file applications for oil and gas leases on those parcels. In return for this service, the partnerships signed promissory notes that entitled the FLFSC to sixty percent of the partnership revenues, including revenues from the oil and gas leases.

The partnerships' lease applications were selected. However, the BLM rejected the applications finding violations of 43 C.F.R. 3112.2-1(f) (1982), which provided that no person shall own an interest in more than one application for a particular parcel, and 43 C.F.R. 3112.2-3 (1982), which required that the applicant disclose all persons and entities having an interest in the lease.

The partnerships appealed to the IBLA which affirmed. The IBLA held that because the

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2/FLFSC has since commenced bankruptcy proceedings in Texas. In re Federal Lease Filing Serv. Corp., No. 384-31348 (Bankr. N.D. Tex.).

service agreements provided that the promissory notes were payable from partnership revenues, FLFSC had obtained an interest in the leases. The IBLA noted that a timely disclaimer might have saved the applications. On request for reconsideration, Snasta Basin and Taylor Basin noted that their service agreements contained a waiver provision which provided that: "FLFSC . . . shall have no priority interest of any kind in any lease won by the Partnership hereunder or the profits arising therefrom; any community of interest is hereby disclaimed by the parties hereto." The IBLA rejected the request for reconsideration, and plaintiffs commenced this action in Nevada district court. The case was removed to Wyoming.

The district court subsequently affirmed the IBLA's decision that FLFSC had obtained an interest in the leases thus violating the regulations. However, the court held that Shasta Basin and Taylor Basin had effectively disclaimed this interest by the waiver

provision. The government appeals the district court's decision as to Shasta Basin and Taylor Basin in No. 86-2816. Joshua Basin and Mesozoic-Paleozoic appeal in No. 86-2817.

In No. 86-2817, Mesozoic-Paleozoic and Joshua Basin argue that the district court erred in affirming the IBLA's decision that the service agreement gave FLFSC an interest in the leases. Plaintiffs argue that this court should not defer to the IBLA's decision because it was not based on the agency's interpretation of its own regulations but rather upon general legal principles which this court reviews de novo. Plaintiffs argue that the promissory notes create no interest in the FLFSC.

We agree that on appeal, we are not obligated to defer to the IBLA's interpretation of the service agreement. See Walker Operating Corp. v. FERC, 874 F.2d 1320, 1332 (10th Cir.), cert. denied, 110 S. Ct. 365 (1989); Jicarilla Apache Tribe v. FERC, 578 F.2d 289, 292-93 (10th Cir. 1978).

However, upon de novo review, we hold that the service agreement clearly granted FLFSC an interest in the leases. The agreement provided that "[p]rincipal on the note shall be payable from 60% of the Partnership revenues until paid in full." (Emphasis added.)

In No. 86-2816, the government argues that the waiver provision in the Shasta Basin and Taylor Basin service agreements did not effectively disclaim FLFSC's interest in the lease applications. We agree.

In reaching its decision, the district court relied on Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982) and Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983), cert. denied, 466 U.S. 972 (1984). We find the facts here distinguishable.

In Lowey and Coyer, the filing service, Resource Service Company (RSC), included provisions in its service agreements which gave RSC an exclusive right for five years to negotiate any sales or assignments of any

leases won by its clients and to receive a set percentage of the proceeds of the leases. When the issue of whether RSC had an interest in the leases arose, RSC unilaterally executed a blanket waiver of the provision. RSC filed the waiver with state BLM officials who administered the federal leasing program. The court held that the unilateral waiver "was a reasonable response to the legal uncertainties surrounding RSC's standard contracts." Lowey, 684 F.2d at 959.

In the case at bar, FLFSC has waived only its "priority interest" and "any community of interest." These terms are vague and not defined. In the absence of any evidence that FLFSC waived its entire interest in lease proceeds, the district court's decision that the agency acted arbitrarily must be reversed as to Taylor Basin and Shasta Basin.

The judgment of the United States District Court for the District of Wyoming is REVERSED in No. 86-2816 and AFFIRMED in No. 86-2817. Case No. 2816 is REMANDED to the district

court with directions to enter judgment affirming the IBLA's judgment as to the Shasta Basin and Taylor Basin partnerships.

ENTERED FOR THE COURT

PER CURIAM

IN THE UNITED STATES DISTRICT COURT

For THE DISTRICT OF WYOMING

JOSHUA BASIN PARTNERSHIP, TAYLOR BASIN PARTNERSHIP, SHASTA BASIN PARTNERSHIP, MESOZOIC-PALEOZOIC JOINT VENTURE	)	Entered
	)	Oct. 10, 1986
Plaintiffs,	)	NO.
vs.	)	C85-0538-B
UNITED STATES DEPARTMENT OF THE INTERIOR, and DONALD HODEL Secretary of the Interior,	)	
Defendants.	)	

O R D E R

This matter came before the court on the parties, cross-motions for summary judgment. The court, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

Plaintiffs appeal a decision of the Interior Board of Land Appeals (IBLA) rejecting their oil and gas lease applications. The parties agree that this matter may be resolved on cross- motions for summary judgment. The crucial issue is whether the service agreements in controversy

create an impermissible interest within the meaning of 43 C.F.R. 3100.0-5(b) (1982). The IBLA's Final decision is affirmed in part and reversed in part.

The Department of the Interior issues certain oil and gas leases on public lands by a noncompetitive process. Prospective lessees apply to the Bureau of Land Management (BLM) by submitting a drawing entry card (DEC). If more than one application is received for the same parcel of land, a drawing is held among the competing applications. The winner is the applicant those card is drawn first. A lease may be denied, however, if the DEC is defective or if the applicant lacks the necessary qualifications. See Brick v. Andrus, 628 F.2d 213, 214 (D.C. Cir. 1980).

The regulations provide that "[n]o person or entity shall hold, own or control an interest in more than 1 application for a particular parcel." 43 C.F.R. 3112.2-1(f). An interest is:

///

> Any claim or any prospective or Future Claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the application or offer is filed.

43 C.F.R. Section 3100.0-5(b) (1982).

Plaintiffs in this case filed lease applications with the BLM in Wyoming, Montana and Colorado. Each plaintiff used the services of the Federal Lease Filing Corporation (FLFC), the Federal Lease Filing Services Corporation (FLFSC), and the Oil and Gas Lease Partnership Management Corporation. FLFC provides services and advice in the filing of federal oil and gas lease applications. FLFSC is FLFC's asset holding company. Plaintiffs, applications were selected in first priority on various parcels of public land. The BLM, however, determined that FLFSC had an interest in each application and therefore rejected the applications.

Each plaintiff executed a promissory note giving FLFSC, FLFC's wholly-owned subsidiary,

a sixty percent share of partnership revenues. The Paleozoic-Mesozoic Joint Venture (Paleozoic), for example, agreed to pay FLFSC a total fee of $422,400. Paleozoic paid $132,000 down and executed an interest-bearing promissory note for the balance. Principal on the note was payable from sixty percent of the partnership revenues. Plaintiffs, Memorandum in Support of Motion for Summary Judgment, Exhibits A-3, A-4. Joshua Basin, Taylor Basin and Shasta Basin all executed similar agreements. See id. at Exhibits B-2, B-3; B-4, B-5; C-3, C-4. The Wyoming BLM rejected the applications of the Joshua Basin and Taylor Basin Partnerships, concluding that FLFC possessed an undisclosed interest in the applications and that the applications violated the multiple filing prohibition of 43 C.F.R. 3122.2-1(f) (1982). The application filed by Paleozoic was rejected by the Montana BLM for the same reason.

The Colorado BLM rejected Basin

Partnership's application because Shasta failed to disclose FLFC's interest in the lease as required by 43 C.F.R. 3112.2-3.

The IBLA affirmed the rejection of plaintiffs applications, Joshua Basin Partnership, 87 IBLA 179, 190 (1985). The IBLA found that FLFSC and FLFC possessed an interest in the proceeds of the leases. Id. at 183-84, 188. The IBLA denied plaintiffs, petition for reconsideration, and plaintiffs, brought this appeal.

The appropriate standard of review is whether the agency's decision has arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Camp v. Pitts, 411 U.S. 138, 141-42 (1973); Wilson v. Hodel, 758 F.2d 1369, 1373 (10th Cir. 1985). The agency's interpretation of its own regulations is entitled to considerable deference, Grynberg v. Watt 717 F.2d 1316, 1318 (10th Cir. 1983), and must be accepted if it is reasonable. American Petroleum Inst. v. Environmental Protection Agency, 540 F.2d

1023, 1029 (10th Cir. 1976). Whether the IBLA acted arbitrarily and capriciously in finding that the service agreements and promissory note executed between plaintiffs and FLFSC created an interest in FLFC in oil and gas leases issued to plaintiffs is the central issue in this case.

Plaintiffs contest the accuracy of the IBLA's finding that the service agreements and promissory notes created an interest within the meaning of 43 C.F.R. 3100.0-5(b). See Joshua Basin Partnership, supra, 87 IBLA at 183-84, 188. They contend that the documents create a mere expectancy. The promissory note is payable from all partnership revenues, not just from the proceeds of plaintiffs, oil and gas leases. Plaintiffs may prepay the promissory notes and cut off FLFSC's proceeds from the leases. They retain the exclusive right to decide whether and then to sell a lease. Plaintiffs finally argue that FLFSC's remedy for a breach of the obligations to pay the promissory note is limited to an action

against each partner. FLFSC therefore lacks an enforceable right to any interest: it is merely, plaintiffs contend, an unsecured creditor of the partnership.

Plaintiffs' argument misstates the problem. While an interest does not arise from a general right of repayment from funds not traceable to the proceeds of the lease, this test is applied at the time the filing was made. Joshua Basin Partnership, supra, 87 IBLA at 184, 186. Even assuming that plaintiffs could cut off FLFSC's interest at some later time, FLFSC did have an interest in proceeds traceable to the lease when the plaintiffs filed their applications.

At that time, the promissory notes entitled FLFSC to sixty percent of plaintiffs' revenues. Those revenues included the proceeds from plaintiffs' oil and gas leases. FLFSC hence received a prospective benefit derived from the leases and therefore possessed an interest in plaintiffs' leases which, if not disclaimed, fell within the

prohibition that "[n]o person or entity shall hold, own or control an interest in more than 1 application for a particular parcel." 43 C.F.R. 3100.0-5(b).

Plaintiffs claim, however, that FLFSC waived its interest. No waivers or disclaimers are present in the Paleozoic or Joshua Basin service agreements. Paleozoic and Joshua Basin argue that the term "payable" in the offending provision in the promissory note is ambiguous and should therefore be construed in their favor. This argument is flawed. First, the issue was not raised before the IBLA. A reviewing court may not consider contentions not pressed upon the agency. Hormel v. Helvering, 312 U.S. 552, 557 (1940); Wilson v. Hodel, 758 F.2d 1969, 1973 (10th Cir. 1985). Second, even if the argument is correct, it does not show that the agency acted arbitrarily or capriciously. Nothing in the argument demonstrates that the agency's interpretation is patently erroneous or inconsistent with the regulations. United

States v. Larionoff, 431 U.S. 864, 872 (1977). The defendants, notion to affirm must therefore be granted with respect to Paleozoic-Mesozoic and Joshua Basin.

A different result is required in the case of Taylor Basin and Shasta Basin. Although the Taylor Basin Partnership agreement states that any provision in the agreement violating federal statutes or regulations is void ab initio, Taylor Basin Partnership Agreement, Art. XIII, 13.08, the provisions of the partnership agreement are irrelevant. The service agreement, not the partnership agreements, created FLFSC's interest. The analysis must therefore focus on the provisions of the service agreements.

Unlike the Paleozoic and Joshua Basin agreements, the service agreements executed by Taylor Basin and Shasta Basin contain a waiver. They state that:

> FLFSC, its affiliates and O&GLPC shall have no priority interest of any kind in any lease won by the partnership or the profits arising therefrom; any community of interest is hereby disclaimed by the parties hereto.

Taylor Basin/FLFSC Service Agreement at 9; Shasta Basin/FLFSC Service Agreement at 10.

The courts have given effect to similar unilateral disclaimers. Lowey v. Watt, 684 F.2d 957, 967 (D.C. Cir. 1982); Coyer v. Watt, 720 F.2d 626, 629 (10th Cir. 1983). In Lowey, the lease filing service waived all interests in its clients, leases and filed the waiver with the BLM. Lowey v. Watt, supra, 684 F.2d at 962, 960. The lease filing service also agreed to notify its clients that they were not bound by the offending provision. Id. The court held that the disclaimer "effectively removed the offensive provision from [the filing service,s] standard contracts." Id. at 960. The court reasoned that this result was fair and consistent with the policies of the noncompetitive leasing program. Id. at 962.

The overarching policy of the noncompetitive leasing program is fairness. Lowey v. Watt, supra, 684 F.2d at 967. The regulations state that "all applicants . . .

shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means of maintaining adequate records of acreage holdings." 43 C.F.R. 3100.0-5(b). Upholding the IBLA despite an unequivocal waiver in the service agreement would penalize the innocent applicants and adversely affect the program itself. Id.

The disclaimers in this case differ from those in Lowey, where no waiver was filed with the BLM. The record in this case, the Findings of the BLM and the IBLA, and the arguments of counsel however, demonstrate that the executed waivers were before the agency at the time it decided to reject the applications. The Department of the Interior, moreover, failed to promulgate regulations prescribing methods to waive impermissible interests. Id. Taylor Basin and Shasta Basin therefore lacked any means to ensure that FLFC's interest was properly waived. Absent reasonable prior notice, administrative

convenience should yield to fairness. Id. Plaintiffs cannot be required to comply with a nonexistent regulation. In this case, as in Lowey and Coyer, the waiver removes the offensive provision from the service agreements. The IBLA therefore acted arbitrarily by overlooking the waivers contained in the Taylor Basin and Shasta Basin service agreements. Citizens to Preserve Overton Park v. Volpe, 401 O.S. 402, 416 (1971). The motion for summary Judgment in favor of plaintiffs Taylor Basin and Shasta Basin must be granted. Therefore, it is

ORDERED that the defendants' decision rejecting the application of plaintiffs, Paleozoic-Mesozoic Joint Venture and Joshua Basin Partnership, is affirmed. It is further

ORDERED that defendants' decision rejecting the applications of plaintiffs Taylor Basin Partnership and Shasta Basin Partnership is reversed and remanded.

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Dated this 10th day of October, 1986.

_____

CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

August 13, 1985

IBLA 84-100, 84-101, 84-]96, 84-226	:	W-83159, W-83748, C-37637,58422 (ND)
87 IBLA 179	:	Oil and Gas
JOSHUA BASIN PARTNERSHIP, TAYLOR BASIN PARTNERSHIP, SHASTA BASIN PARTNERSHIP, MESOZOIC-PALEOZOIC JOINT VENTURE	:	Petition for Reconsideration Denied

ORDER

On June 13, 1985, this Board issued a decision captioned Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (1985) (Joshua Basin Partnership), wherein we affirmed certain decisions issued by the Wyoming, Colorado, and Montana State Offices, Bureau of Land Management, rejecting applications for oil and gas leases W-83159, W-83748, C-37637, and M-58422 (ND). Subsequently, appellants (petitioners) retained new counsel, who on July 17, 1985,

authority to grant such a motion only in extraordinary circumstances, where in the judgment of the Board sufficient reason appears. 43 CFR 4.21(c) Petitioners' submitted reasons do not warrant reconsideration of this matter.

Petitioners' motion is based on assertions that questions of law and fact exist which were not addressed by the Board. Specifically, counsel maintains that the Board did not consider the affect of certain provisions in the Taylor Basin and Shasta Basin Partnership Agreements which provided that any provision which violates any Federal statute or regulation relating to oil and gas leasing is void ab initio. With respect to

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1/ The motion seeks reconsideration by the Board en banc. While the Board has adjudicated some matters en banc, there is no procedural right to obtain en banc review. With respect to a petition for reconsideration en banc, this Board follows a procedure similar to that used by the United States Courts of Appeals. See Fed. R. App. P. 35(b). Here, after full circulation of the petition anf dispositive order prepared by the three-judge reviewing panel, no member of the Board requested a vote on whether this matter should be considered en banc. Thus, the request is denied.

Mesozoic-Paleozoic Joint Venture and Joshua Basin Partnership counsel contends that the Board misinterpreted language in the promissory notes relative to payment from 60 percent of partnership revenues to Federal Lease Filing Service Corporation (FLFSC) so as to create an interest in any lease obtained by the partnership.

We note first that it was the service agreements between Federal Lease Filing Corporation (FLFC) and the partnerships, not the partnership agreements, which created an interest in FLFC. The fact that the partnership agreements provided for invalidating certain provisions of that document in no way affects the terms of the service agreement between the partnership and FLFC. In response petititioners' second basis for reconsideration, we point out that we examined the nature of the interest created by the service agreements which provided that the principal of the note would be payable from 60 percent of the revenues of the maker, see footnote 6 of our decision, and concluded that

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

Gail M. Frazier
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
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JOSHUA BASIN PARTNERSHIP
TAYLOR BASIN PARTNERSHIP
SHASTA BASIN PARTNERSHIP
MESOZOIC-PALEOZOIC JOINT VENTURE

IBLA 84-100, 84-101, 84-196, 84-226 Decided June 13, 1985

Consolidated appeals from decisions of the Wyoming, Colorado, and Montana State Offices, Bureau of Land Management, rejecting applications for oil and gas leases W-83159, W-83748, C-37637, M-58422 (ND).

Affirmed as modified.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Sole Party in Interest

If the identity of the holder of an interest in an oil and gas lease application is not disclosed on the application form, the application must be rejected for failure to disclose a party in interest. If a person has an interest in more than one application

filed for the same parcel, the application must be rejected as constituting a prohibited multiple filing.

2. Oil and Gas leases: Applications: Drawings--Oil and Gas Leases: Applications: Sole Party in Interest--Words and Phrases

"Interest in an oil and gas lease or offer."

Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

APPEARANCES: Phillip Wm. Lear, Esq., and Matthew F. McNulty III, Esq., Salt Lake City, Utah, for appellants; Marla E. Mansfield, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; David A.

Gottenborg, Esq., for Kenneth M. Britt; Irma Roberts Spear, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

These are consolidated appeals from separate decisions of the Wyoming, Colorado, and Montana State Offices, Bureau of Land Management (BLM), rejecting simultaneous oil and gas lease applications filed by Federal Lease Filing Corporation (FLFC) on behalf of appellants. The appeals differ somewhat in their procedural history. By decision dated September 26, 1983, the Wyoming State Office, BLM, rejected the application of Joshua Basin Partnership (Joshua) for oil and gas lease W-83159, having concluded that FLFC had an undisclosed interest in the application and also because there was a violation of the multiple filing prohibition found at 43 CFR 3112.2-1(f). Joshua's appeal has been assigned docket No. I8LA 84-100. The Wyoming State Office rejected the application of Taylor Basin Partnership (Taylor) for oil and gas lease W-83748 for the same reasons by

decision dated September 28, 1983. Taylor's appeal has been assigned docket No. IBLA 84-101.

By decision dated November 10, 1983, the Colorado State Office rejected the application of Shasta Basin Partnership (Shasta) for oil and gas lease C-37637 because Shasta failed to disclose FLFC's interest in the lease as required by 43 CFR 3112.2-3. This decision was prompted by a protest filed by Kenneth M. Britt. Shasta's appeal was assigned docket No. IBLA 84-196.

By decision dated November 30, 1983, the Montana State Office, BLM, rejected an application for oil and gas lease M-58422 (ND) filed by Mesozoic- Paleozoic Joint Venture (Mesozoic-Paleozoic), another FLFC client, a combination of the Mesozoic Partnership and the Paleozoic Partnership. In response to a protest by Irma Roberts Spear, the State Office had asked for a complete list of partners in the partnerships that made up the joint venture involved in filing for that

lease. The list revealed that Wayne Terry, a member of Mesozoic-Paleozoic, was also a partner in the Precambrian Partnership which joined with the Quaternary Partnership to form the Precambrian-Quaternary Joint Venture. The State Office determined that because both of these joint ventures filed simultaneous applications for lease M-58422 (ND), Wayne Terry had an interest in more than one application filed for that parcel in violation of the prohibition against multiple filings, 43 CFR 3112.2-1(f) (1982). 1/ The decision also noted that because FLFC had an interest in the applications

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1/ BLM and Mesozoic-Paleozoic subsequently stipulated that Wayne Terry withdrew from the Precambrian-Quaternary Joint Venture on Jan. 21, 1982, and, therefore, was not a partner or joint venturer in the Precambrian-Quaternary Joint Venture on the date of the filing for M-54822 (ND) or any other filing for the Precambrian-Quaternary Joint Venture (Stipulation of Facts and Law 171, at 47; Documents and Affidavits Supporting Stipulation of Facts and Law, Tab 55). Although Spear was not a party to this stipulation, there is nothing in the record to indicate that this stipulation of fact is incorrect. Accordingly, the rejection of the application by Mesozoic-Paleozoic can no longer be based on a finding of a multiple interest on the part of Wayne Terry, and the decision below is modified accordingly.

f/n. 1 (continued

Before these appeals had been consolidated, Britt and Spear sought to intervene in the appeals involving the Joshua and Taylor Partnerships. The Board granted their motion to intervene as amicus curiae by order dated Dec. 22, 1983. Irma Roberts Spear has moved to dismiss the appeal of Mesozoic-Paleozoic on the grounds that the Joint Venture has failed to file reasons for its appeal within the time allotted and has otherwise failed to pursue its appeal in a proper time or manner. These arguments are without merit in view of the fact that the Board had extended the time in which that appellant was required to file its statement of reasons.

filed by its clients, it also violated the prohibition on multiple filing. Mesozoic-Paleozoic's appeal from that decision was assigned docket No. IBLA 84-226.

Although each appellant certified that it was the sole party in interest to its application, BLM determined that FLFC had an interest in each application because each appellant had executed a note effectively giving Federal Lease Filing Services Corporation (FLFSC), a wholly owned subsidiary of FLFC, a 60-percent share of the proceeds from the leases which are the subject of this appeal. 2/ Because FLFSC's interest was not disclosed in the space provided on the application forms, BLM rejected appellants' applications. Moreover, BLM determined that FLFC had entered more than one client for each parcel, so that FLFSC had an interest in more than one application for a parcel in violation of 43 CFR 3112.2-1(f). This violation of the prohibition against multiple filings provided BLM with an additional ground for rejecting

appellants' applications.

2/Appellants are all clients of FLFC which provides advisory and filing services to its clients in Federal and State oil and gas leasing systems for a fee (Statement of Reasons at 5). FLFSC was established to function as an asset holding/accounts receivable company for FLFC (Statement of Reasons at 6).

The BLM decisions refer to FLFC as having an interest in the applications; FLFSC however, holds the notes. While FLFC and FLFSC are separate entities, they act in concert with respect to the services they provide their clients.

The service agreements between appellants and FLFC work in conjunction with the service agreements which each appellant executed with FLFSC. Under the terms of the arrangement, FLFC performs the advisory and filing services, and FLFSC receives payments for services in the form of cash payments and amortization of the promissory notes (Stipulations 60, 99, 137, and 167). The amounts to be paid in advance to FLFC are the same amounts obligated to be paid to FLFSC. The partnerships and the Joint Venture are obligated for one sum under the terms of the two service agreements (Stipulations 61, 100, and 138). FLFSC is the payee and intended recipient of the cash advance payments and the sums due and owing under the promissory notes. Upon receipt of cash payments, FLFSC forwards the amounts paid by appellants to FLFC so that services may be provided under the service agreements between FLFC and appellants (Stipulations 62, 101, 139, and 167).

If FLFSC had an interest in appellants' lease applications as that term is defined at 43 CFR 3100.0-5(b) (1982), there is no doubt that appellants' applications were properly rejected. That regulation refers to an applicant's obligation to disclose the name of any party having such an interest on the application, and when an applicant submits an application form, he certifies that "No party, other than the applicant and these identified herein as other parties in interest, owns or holds an interest in this application, or the offer or lease which may result." Although FLFC is identified as a filing service on appellants' applications, no entry appears in the spaces provided for identification of other parties in interest. If FLFSC has an interest in appellants' applications and such interest was not identified on the application forms, the applications were not "completed" as required by 43 CFR 3112.2-1(a) (1982), and were properly rejected pursuant to 43 CFR 3112.6-1(a) because they were not filed in

accordance with the requirements of section 3112.2. Furthermore, if FLFSC had such an interest in more than one application filed for a parcel, a multiple filing occurred and each such application must be rejected. 43 CFR 3112.2-1(f).

The courts have strictly enforced the requirement that the Department reject oil and gas lease applications filed by applicants who have failed to disclose the identity of other parties in interest and who have violated the prohibition on multiple filings. E.g., June Oil & Gas, Inc. v. Watt, 717 F.2d 1323 (10th Cir. 1983), cert. denied, _____ U.S.__, 104 S. Ct. 2169 (1984); McKay v. Wahlenmeier, 226 F.2d 35 (D.C. Cir. 1955); cf. Geosearch v. Watt, 721 F.2d 694 (10th Cir. 1983), cert. denied, ____ U.S. ___, 104 S. Ct. 2347 (1984); Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 2346 (1984); Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982) (rejection of leases held improper where filing service had waived and disclaimed

service contract provision constituting an interest). 3/

Throughout their statement of reasons, appellants assert that the relationship existing between FLFC and FLFSC is legitimate and not in violation of the regulations. We recognize that the regulations do not prohibit interests from being created by applicants. Indeed, such interests serve many legitimate and necessary business purposes. The legitimacy of the interest, however, does not exempt the applicant from having to disclose the identity of the holder of that interest on his application form. Nor is the legitimacy of the reason for creating an interest a consideration recognized by the Department when determining whether someone has an interest in more than one application filed for the same parcel.

3/ Geosearch, Coyer, and Lowey are distinguishable from the instant appeals by the fact that FLFSC never released appellants from the obligation determined by BLM to constitute an interest in appellants' applications.

The critical issue common to all of these appeals is whether FLFSC had an interest in appellants' applications. The facts of these cases are not disputed. Pursuant to their service agreements with FLFC, each appellant made an initial cash payment and executed an interest bearing note payable to FLFSC due in 1989 for more than twice the value of the cash payment. 4/ Each individual member of a partnership made a cash payment and executed a non-interest bearing promissory note to the partnership in amounts proportional to his share of the partnership.

4/ The Joshua Basin Partnership, for example, made a cash payment to FLFSC of $100,000 and executed a note for $264,000 (Documents, Tab 21). The Taylor Basin Partnership paid FLFSC $70,000 in cash and executed a note for $154,000 (Documents, Tabs 33, 34). Shasta Basin Partnership paid FLFSC $77,000 in cash and executed a note for $169,400 (Appendix, Tabs 43, 44). The Mesozoic-Paleozoic Joint Venture, a combination of the Mesozoic Partnership and the Paleozoic Partnership, paid $132,000 in cash and executed a note for $290,400.

5/ The notes and service agreement executed on behalf of appellants provide that the principal shall be payable from 60 percent of the revenues of the maker. 6/ Therefore, FLFSC has a right to 60 percent of the proceeds from any Federal oil and gas lease issued to any appellant until that appellant's note is paid.

5/ For each unit of the Joshua Basin Partnership, for example, a subscriber paid $12,000 in cash and executed a subscription note in the amount of $26,400 (Documents, Tabs 18, 19). The Solicitor suggests that investors were attracted to join the partnerships in part because they were told that they could deduct from their taxable income in the first year not only the amount of cash that they had paid but the value of the notes as well, for total deduction of more than three times the value of their cash outlay. This is indicated in the summaries of the programs (Documents, Tabs 56 through 59).

6/ See Documents, Tabs 21, 34, 43, and 54 for the promissory notes. Joshua's note provides in part as follows:

"This Note is payable as follows: Principal and interest in full on or before December 31, 1989. However, the undersigned may extend the maturity date of this note for an additional five (5) years by the payment of two points of the outstanding balance on or before December 31, 1989.

fn 6 (continued)

"Interest shall be accrued until principal has been paid in full. Interest shall be due on a non-recourse basis. Principal on the Note shall be payable from 60% of the revenues of the Maker. After complete amortization of the principal, accrued interest shall te payable frcm 60% of the revenues of the Maker."

Although appellants describe this provision as a prepayment feature, this characterization is incorrect because the maker of the note has no option about making the required advance payment. Because the realization of revenue makes earlier payment mandatory, this feature is more accurately charcterized as an acceleration. See Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D. Ill. 1972).

[2] Appellants view the issue in these appeals to be a complicated one and have submitted lengthy briefs and have requested oral argument. We, however, do not share appellants' perception of the complexity of the issue to be resolved or that an oral argument is warranted. Although the relationships between appellants, their filing service, and other entities may be somewhat complex, the legal issue is simply whether a right to share in the proceeds of a lease constitutes an "interest" as defined by 43 CFR 3100.0-5(b):

> Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any aggrement [sic] or understanding existing at the time when the application or offer is filed, is deemed to constitute an "interest" in such lease. [Emphasis added.]

It would be hard to identify a clearer example of an interest under this definition than an agreement to share proceeds of a lease should one issue. Tne fact that appellants' notes to FLFSC oonstitute such an agreement oannot be denied.

Although appellants recognize that FLFSC has a right to share in the proceeds of a lease, appellants assert that this creates no interest because it is nothing more than a "general right of repayment." Appellants' effort to characterize their interest as a "general right of repayment" arises from the Board's holding in Wayne E. DeBord, 50 IBLA 216, 87 I.D. 465 (1980), aff'd sub nom. Landis v. Clark, Civ. No. CV-81-74-BLG (D. Mont. 1984). The text of that decision, however, makes it quite clear that when the Board referred to a "general right of repayment," it was not referring to a right to share in the proceeds of a lease:

> In the cases herein, Landis has an interest in each of the lease offers made pursuant to the pool agreement. He advances funds for filing entry cards and paying annual lease rentals under the terms of the agreement. He is also entitled to impose an unspecified charge on the pool as a "consultation fee," plus a general charge for office and clerical expenses. He is entitled to be reimbursed with interest from the proceeds of the sale or assignment of any lease issued, for which he may secure payment by "liens or other legal means." This is participation in the issues or profits which may accrue "in any manner" from the lease and is an "interest" within the meaning of 43 CFR 3102.7. 43 CFR 3100.0-5(b).
>
> This case is distinguished from such cases as D. E. Pack, supra, and Geosearch, Inc., supra, by the fact that under the agreenent Landis has a contractual right to be reimbursed with interest from the proceeds of the sale of any lease issued, and not a general right of repayment. [Emphasis in original.]

Id. at 468.

The language that the Board emphasized in DeBord makes clear the distinction between an interest and a general right of repayment. An interest does not arise from a general right of repayment from funds not traceable to the proceeds of a lease; if repayment is to be made from those proceeds, an interest arises.

Appellants contend that in order to find that an interest exists, BLM must not only show that FLFSC has a right to share in the proceeds of a lease, but also that FLFSC has some other "advantage or benefit." Appellants deny that their notes provide FLFSC with any advantage or tenefit because they only provide a means for payment of an obligation that would otherwise be due regardless of whether a lease issued. Appellants conclude that no interest arises within the meaning of the regulation from an agreement to share the proceeds of a lease if the proceeds are used to pay an underlying obligation.

Appellants' contention that FLFSC would derive no advantage or benefit frcm its right to share in the proceeds of a lease is untenable. If leases were issued and appellants realized proceeds from those leases, FLFSC would be entitled to 60 percent of those specific proceeds prior to the due date of the note unless the principal and interest for some reason or other had already

been paid. While appellants deny that this arrangement confers an obvious advantage or benefit on FLFSC, this Board can conceive of no circumstances in which a right to share in lease proceeds would not constitute an advantage or benefit. 7/

Considering the nature of the arrangement, appellants' observation that the lease proceeds are used for advance payment of an underlying debt provides no basis for concluding that FLFSC has no interest in appellants' applications. The regulation

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7/ Appellants deny that FLFSC realizes any benefit from early amortization of the notes due to the realization of lease proceeds because FLFSC is in fact suffering a loss of interest accrued on the prcmissory notes (Statement of Reasons at 38). BLM responds that this payment oonstitutes a benefit because "[C]urrent funds are generally preferred over tenuous future payments (especially for the unsecured interest). More importantly, being paid early guards against the possibility that they might not be paid at provides no exception to the definition of interest based on the ultimate purpose of an agreement to share the proceeds of a lease. The fact that the obligation all due to the defenses that might be raised by the partnerships. These defenses could include failure of consideration or impossibility of performance." (Response at 17). This latter statement is predicated on the possibility that Congress might enact a bill to require competitive leasing.

would continue if no lease were issued is irrelevant. To construe the regulation as appellants argue we should would deprive it of any rational force or effect.

Moreover, the regulation does not require BLM to establish that FLFSC has some other advantage or benefit in addition to its right to share in lease proceeds. The regulation is clearly intended to be broad in scope; it lists several types of interests, any one of which satisfies the definition. It is drafted to ensure that even if an agreement does not give a third party the right to share in the proceeds of a lease, that party would still have an interest if the agreement confers some other advantage or benefit from the lease. In H. J. Enevoldsen, 44 IBLA 70, 86 I.D. 643 (1979), aff'd. Enevoldsen v. Andrus, No. C-80-0047B (D. Wyo. June 24, 1981), the Board found an "interest" where the offeror through an oral agreement granted another person a first right to buy any lease issued. The Board found that such an arrangement conferred

a "claim to an advantage or benefit" and did not consider whether the arrangement constituted a right to share in lease proceeds. Id. at 81, 86 I.D. at 648. Indeed, the Board stated that "the word 'claim' *** connotes something less than a right which may be successfully enforced in the courts." Id. at 83, 86 I.D. at 649. Although appellants observe that the Board applies a "two-pronged test" in deciding whether an interest exists (Statement of Reasons at 28), appellants have failed to note that each "prong" constitutes an independent basis for such a determination. In DeBord, for example, the Board considered it sufficient to find that undisclosed parties had a right to share in the proceeds of the lease. The elements of the transaction were not separately analyzed as advantages or benefits.

Appellants misread our decision in Warren R. Haas, 57 IBLA 247 (1981), which they claim supports their position and controls disposition of these appeals. In Haas, we

held that there was no interest created when an oil and gas lease offeror in a written agreement gave his filing service a "security interest" in any lease issued pursuant to an offer filed under the service agreement to secure any payment of the lease rental advanced to BLM by the service. If the filing service advanced rental for any lease won by the applicant, the security interest would arise only if the applicant failed to reimburse the leasing service.

In arguing that his filing service had no interest in his application, Haas noted that the Board had held that no interest arises where the client has the option of retaining the leasing service to sell a lease, in contrast to agreements which require the client to use the services of the leasing service and thereby create an interest. Compare Estate of Glenn F. Coy, 52 IBLA 182, 88 I.D. 236 (1981), with Philip A. Kulin, 53 IBLA 57 (1981); Geosearch, Inc., 48 IBLA 190 (1980). In other words, an interest arises if

the applicant has given a third party the exclusive right to market his lease; however, if the applicant had the option to market his lease elsewhere, the leasing service did not have a case to an advantage or benefit nor a right to share in lease proceeds. Haas argued that he had the option of allowing his filing service to advance the first year's rental, so that the "security interest" would only arise if Haas chose to use the filing service's funds for payment of the first year's rent and failed to reimburse the service for the rental advanced.

Thus, at the crucial time, i.e., when the filing was made, no security interest existed in Haas. Whether or not one did arise was dependent upon the election of the applicant, after the drawing, to have the filing service tender the first year's rent. In the instant case, at the time the subject filings were made, FLFSC was already vested with its security interest in the proceeds of future sales. The fact that, had appellants

accelerated their principal and interest payments prior to the sale of the leases, FLFSC's claim on the proceeds of the sale would have ended, does not alter the fundamental fact that at the time the applications were filed, such a claim existed. Unlike the interest of the filing service in Haas, which could arise only after the filing period, FLFSC's interest pre-existed the filing of the applications and thus was required to be disclosed in the applications as an existing interest in the applications under 43 CFR 3100.0-5(b) (1981). Failing to do this, the applications were properly rejected.

The Haas decision also refutes appellants' contention that BLM must show both (1) a right to share in lease proceeds and (2) some other "advantage or benefit." Although we found that the leasing service had no right to share in the proceeds of the lease, we still had to consider whether it had a prospective or future claim to an advantage or benefit. In

doing so, we reviewed the facts of the DeBord case to illustrate what might constitute an advantage or benefit, although that particular element of the definition of interest had not been discussed or applied in DeBord:

> With respect to a prospective or future claim, 43 CFR 3100.0-5(b) presides that it must be a claim "to an advantage or benefit from the lease." In this case we cannot find that FEC derives any advantage or benefit from a lease issued pursuant to an offer filed under the service agreement. FEC is merely entitled to reimbursement for the amount of the rental advanced on appellant's behalf. The agreement provides only that a lease will be security for that payment. This case may be distinguished from Wayne E. DeBord, supra, in that in DeBord the agreement cal- led for reimbursement with interest from the proceeds of the sale of any lease issued. In addition, the pooling agreement in DeBord provided that proceeds from the lease of any member could be used by a certain individual to reduce or discharge the debt owed to him by all the members for services rendered in connection with all the offers and leases involved. [Emphasis in original.]
>
> Herein, FEC is not seeking an advantage or benefit from a lease. FEC is providing a service to its customers. If a customer wins a lease in a drawing and is unavailable to pay the lease rental for whatever reason (out of town on business in this case), FEC will advance the rental. The agreement does not mention interest on the advanced

> funds, or any fee or commission for such service. [Emphasis added.]
>
> Accordingly, at the time appellant's DEC was filed FEC did not have an "interest" within the meaning of 43 CFR 3100.0-5(b), for which disclosure would be required under 43 CFR 3102.7.

Id. at 251. The transaction in the DeBord case, as interpreted in Haas, contained a number of advantages or benefits which constituted independent bases for concluding that an interest within the meaning of the regulation had arisen. Nevertheless, we quite plainly held in DeBord itself that the interest arose because of Landis' right to be reimbursed from the proceeds of a lease. 8/ The dispositive factor in Haas, however, was that Haas had the option to preclude any interest in the proceeds from arising either by tendering the rental himself or by

8/ It should be noted that in the original DeBord decision, the emphasized language did not include the phrase "with interest." When the Board referred to the DeBord decision in Haas. this phrase was emphasized in order to illustrate an additional "advantage or benefit" that appeared in the DeBord case that was not present in the Haas case.

reimbursing the service client for the money advanced for rental.

Based on our analysis of DeBord in Haas, the parties attempt to establish whether FLFSC has additional advantages or benefits. Such a finding is not necessary, however, because it overlooks the simple fact that an interest exists by virtue of FLFSC's right to share in the proceeds of a lease. No other advantage or benefit need be shown.

We do not mean to suggest that BLM erred in its analysis of applicants' arrangements in terms of advantages or benefits. Appellants' arrangements bear significant similarity to those in DeBord that we identified as advantages in Haas. In DeBord like the instant appeals, an advantage arises because lease proceeds will be used to repay interest and service fees in addition to any money that the services may have advanced to BLM on appellants' behalf. The fact that this agreement creating an interest is embodied in a promissory note makes no difference; an

interest within the regulation may be based on "any agreement or understanding," without regard to what form that agreement may take.

Appellants suggest that FLFSC is merely imposing upon a pre-existing debt "what is in today's economy reasonable interest rates in order to be repaid for the use of time and expenses incurred in filing" 9/ (Statement of Reasons at 34). Interest charges, however, involve not only the cost of money per se, but entail a return to the lender as a profit. FLFSC's return is secured, as a contractual right, by any partnership proceeds from sale of a lease. Compared to a totally unsecured

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9/ With respect to the Shasta and Taylor agreements, which require mandatory principal reduction payments, it is difficult to see how these payments can compensate FLFSC for expenses already incurred in filing applications since, by the terms of the agreements, all monies obtained under the mandatory principal reduction provision are used for additional filings on behalf of the partnerships.

creditor who has only a general right of repayment, 10/ FLFSC is clearly benefitted by its contractual claim to part of the proceeds.

Appellants contest that their filing did not violate the prohibition on multiple filings because "[b]y signing the partnership or joint venture agreement in subscribing; to the programs, all partners [or] joint venturers waived the fiduciary duties of all other general partners thereby circumventing the multiple filing prohibition" (Statement of Reasons at 48). This argument, however, is misdirected. The regulation prohibiting multiple filings was violated because FLFSC

10/ Contrary to the assumptions of the parties to this appeal, nothing in our decision in Warren R. Haas, supra, described the security interest therein as a mere general right of repayment. While we recognized that the agreement in Haas did not constitute a security interest as that term is defined in Article 9 of the Uniform Commercial Code (id. at 248, n.3), nothing in our discussion implies that a contractual right of repayment from proceeds was not an "interest in the application as that term is defined in the regulations. The key consideration was that in Haas the interest could not arise until after the filing and, thus, did not violate the rules mandatory disclosure of all interested parties.

had an interest in more than one application per parcel, since more than one client filed for a parcel pursuant to a service agreement and promissory note giving FLFSC an interest in each application. The regulation would serve no purpose if it could be circumvented merely by the agreement of those who are party to a multiple filing scheme. Although the beneficiary of a fiduciary relationship may sometimes be able to disavow its interest so that no multiple filing would occur, 11/ that did not happen in these appeals. In order to have such effect, the waiver must renounce the interest that would arise from the competing applications. The only waiver that could have been effective in these cases would have to consist of a disclaimer of FLFSC's interest in

11/ An example of such a waiver is presented in Raymond J. Stipek, 74 I.D. 57 (1967), where a corporation disclaimed any interest in oil and gas leases obtained by its officers that would have arisen from their fiduciary duties to the corporation. The officers filed applications for the same parcel; the corporation did not.

the lease arising from the note, i.e., FLFSC would have to waive that provision of the note entitling it to a share of the proceeds of the lease. Cf. Lowey v. Watt, supra. Appellants' argument must fail because FLFSC had not waived or disclaimed its interest in the applications from which the multiple filings arise before these applications had been filed and winners selected. Indeed it has not done so to date.

Appellants contend that the business arrangements established by the partnership and the joint venture agreements and the service agreements with FLFC/FLFSC are the type of innovative financing arrangements encouraged by BLM in a document dated February 15, 1984, entitled "Determination of Effects: Proposed Agreement to Regulations Governing the Bureau of Land Management Simultaneous Oil and Gas Leasing Program by Requiring Advance Rental Payment." The matter addressed by that document bears no relevance to the instant appeals.

At the time appellants filed their applications, only an applicant whose application had been selected was required to submit advance rental for the parcel. The document cited by appellants involved a proposed amendment to the regulations to require all applicants to submit the advance first year's rental with their applications in addition to filing fees, an especially heavy financial burden which appellants were not required to meet when their applications were submitted. Despite the fact that the Department referred to the need for innovative financing arrangements to address this problem, which is not pertinent to this appeal, nothing in the text of the document cited by appellants even remotely supports the conclusion that a filing service may lawfully take an interest in its client's applications and file more than one application per parcel. No change has been made in the regulations to legitimatize the nature of the relationships created here. 12/

We note that intervenors (see note 1) have asserted that appellants' applications should be rejected because appellants used an improper address on the applications. In light of our disposition of the above questions we need not decide whether the addresses used by appellants do, in fact, violate 43 CFR 3112.2-1(d) (1981). But see Margaret G. Pascale, 83 IBLA 268 (1984).

12/ Even if the regulations had been changed, such a change would not operate to retroactively validate appellants' applications. Irma Spear, 42 IBLA 360 (1981); see generally Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified, and request for oral argument is denied.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge